FOURTH CIRCUIT CONCLUDES THAT WEST VIRGINIA STATE LAW PREEMPTS LOCAL ORDINANCE BANNING OIL AND NATURAL GAS WASTEWATER STORAGE

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On August 30, 2017, in *EQT Production Company v. Wender*, the United States Court of Appeals for the Fourth Circuit affirmed a federal district court's invalidation of a West Virginia county's ordinance banning oil and natural gas wastewater storage at horizontal drilling sites and underground injection control ("UIC") wells. The Fourth Circuit concluded that the West Virginia Oil and Gas Act (the "Oil and Gas Act") and West Virginia UIC Program preempted the ordinance. [1] The Fourth Circuit's ruling is the latest development in the evolving caselaw regarding whether, in the Appalachian Basin, local governments are preempted from regulating oil and gas operations. [2]

THE *WENDER* DECISION

In its decision, the Fourth Circuit ruled in favor of EQT Production Company ("EQT") by affirming the U.S. District Court for the Southern District of West Virginia's holding that Fayette County's (the "County") ban on wastewater disposal is preempted by the state and federal laws under which West Virginia issues injection well permits. [3]

In January of 2016, Commissioners of Fayette County, West Virginia (the "County") enacted an "Ordinance Banning the Storage, Disposal, or Use of Oil and Natural Gas Waste in Fayette County" (the "Ordinance"), which explicitly prohibited the use of UIC wells for purposes of permanently disposing of natural gas waste and oil waste. [4] Immediately afterwards, EQT challenged the Ordinance in the district court, asserting that it was preempted by the comprehensive state and federal regulations that are associated with West Virginia's UIC permit program, the federal Safe Drinking Water Act, and the Oil and Gas Act. [5] EQT asked the court to enjoin the enforcement of the Ordinance. [6] In response, the County argued that the savings clause in West Virginia's Water Pollution Control Act ("WPCA") gives it the authority to abate anything that its commission determines to be a public nuisance, including UIC wells. [7]

The Fourth Circuit explained that, in West Virginia, county commissions have only the powers that are granted to them by the state, meaning that when a "provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect." [8] The Fourth Circuit stated that, as a result, "West Virginia law simply does not permit a county to ban an activity—here, the permanent disposal of wastewater in Class 2 UIC wells—that is licensed and regulated by the state pursuant to a comprehensive and complex permit program." [9]

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The Fourth Circuit also explained that the County's reliance on the savings clause in West Virginia's WPCA was misplaced because West Virginia regulates UIC wells not only under that statute but also under its Oil and Gas Act, which does not contain a savings clause. [10] Rejecting the County's broad interpretation of the WPCA's savings clause, the Fourth Circuit stated that the purpose of the clause is to preserve private citizens' rights to bring a nuisance action against a state-permitted activity, not to ban that activity altogether. [11]

Finally, the Fourth Circuit held that the Ordinance's restriction on wastewater storage at conventional well sites was preempted because it conflicted with the Oil and Gas Act. [12] Explaining that, under the Oil and Gas Act, "the legislature has vested in the state DEP the exclusive authority over regulation of the state's oil and gas resources," the Fourth Circuit concluded that by banning wastewater storage unless the storage was temporary and the wastewater would be permanently disposed in another county, the Ordinance was in fundamental conflict with the Oil and Gas Act and DEP regulations, which do not prohibit or impose temporal limits on wastewater storage. [13]

In applying West Virginia law, therefore, the Fourth Circuit struck down a local ordinance that purported to regulate the mechanics of oil and gas operations. The court, however, did not address whether local ordinances may impose restrictions on where oil and gas operations may occur. [14]

THE FUTURE OF LOCAL REGULATION OF OIL AND GAS OPERATIONS IN WEST VIRGINIA

Generally speaking, under the evolving preemption caselaw in West Virginia, local governments cannot enact ordinances that regulate the development of UIC wells. However, oil and natural gas production and associated companies operating in the Appalachian Basin should continue to monitor these issues so that they have a full understanding of their rights and obligations in relation to local government actions that impact their operations.

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[1] *See* EQT Prod. Co. v. Wender, No. 16-1938, 2017 WL 3722448, at *1 (4th Cir. Aug. 30, 2017).
[2] The caselaw on this topic has been evolving not only in West Virginia, but also in Ohio and Pennsylvania. In Ohio, although a local ordinance may not restrict oil and gas operations that the state has specifically authorized, it is unclear whether and how "traditional goals of zoning" may be used to affect those operations. *See State ex rel. Morrison v. Beck Energy Corp.*, 37 N.E.3d 128, 131 (Ohio 2015) (J. O'Donnell, concurring). In Pennsylvania, moreover, statutory provisions that first appeared in the state's 1984 Oil and Gas Act, which are once again controlling on the issue of preemption of local ordinances after the decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), expressly preempt local ordinances that attempt to regulate well site procedures and operations but not local ordinances that regulate well location. *See Robinson Twp.*, 83 A.3d at 977–84 (invalidating portions of Pennsylvania's Act 13).
[3] Wender, 2017 WL 3722448, at *1.
[4] *Id.* at *3.
[5] *Id.*
[6] *Id.*
[7] *Id.*

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[8] *Id.* at *7 (internal citations omitted).
[9] *Id.*
[10] *Id.* at *8.
[11] *Id.* at *9.
[12] *Id.* at *10.
[13] *Id.* at *10–11.
[14] Several years before *Wender*, the Circuit Court of Monongalia County, West Virginia, invalidated a ban on hydraulic fracturing that the City of Morgantown had imposed, ruling that the state's interest in oil and gas development and production provides the DEP with exclusive control over this issue. *See NE Natural Energy, LLC v. City of Morgantown, W. Va.*, No. 11-C-411 (W. Va. Cir. Ct. Monongalia Aug. 12, 2011). About a year later, the Morgantown City Council passed six ordinances that are unique in West Virginia in that they limit gas drilling to a certain area, namely, a 600-acre area surrounding the city's airport. Those ordinances have not been challenged in court.

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